In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1110

WWIZ, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

Petitioner seeks review of an order of the court of appeals (Pet. 15) affirming without opinion a decision of the Federal Communications Commission (J.A. 22)[1] declining to reopen a proceeding denying renewal of petitioner's broadcasting license. We submit that the decision below is correct, that no issues of general importance are presented, and that further review of this record is not warranted.

On March 25, 1964, the Commission denied the application of WWIZ, Inc. for renewal of the license of radio station WWIZ at Lorain, Ohio, and a separate

[1] J.A.—refers to the Joint Appendix in the court below.

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application by the Lorain Journal Company for transfer of control of WWIZ from Sanford A. Schafitz to the Lorain Journal Company. *WWIZ, Inc.*, 36 F.C.C. 561, rehearing denied, 37 F.C.C. 685. It concluded, after extensive administrative proceedings, that the activities of Schafitz and the Journal had resulted in a transfer of actual control of WWIZ, Inc. to the Journal without prior consent of the Commission in violation of the Communications Act and of the Commission's Rules, and that Schafitz's filing of misinformation and withholding of information in regard to these matters had constituted a clear breach of his duties and responsibilities to the Commission. The court below held that the Commission's findings were supported by substantial evidence, and affirmed. *Lorain Journal Co.* v. *Federal Communications Commission*, 351 F. 2d 824 (C.A.D.C.). On April 4, 1966 this Court denied WWIZ's petition for a writ of certiorari, 383 U.S. 967, and on May 16, 1966, it denied its petition for a rehearing, 384 U.S. 947.

Approximately three weeks later, on June 9, 1966, WWIZ petitioned the Commission to set aside its order denying the application for renewal, to reopen the record, and to enlarge or change the hearing issues which had governed the preceeding. It contended that in another case allegedly involving a similar violation by its competitor, Station WEOL, the Commission's preliminary designation of issues had indicated that even if the violation were established it might warrant only a fine. *Elyria-Lorain*, 30 F.R. 12693. WWIZ urged that the Commission had acted arbitrarily by limiting the sanctions in its case to re-

newal or denial while permitting consideration of lesser sanctions in WEOL's case (J.A. 6–11).

The Commission denied WWIZ's petition on the ground that the matter of lesser sanctions could have been raised in the earlier proceeding, and that in any event the contention was without merit. It found that in WEOL's case preliminary information available to the Commission suggested the possibility that lesser sanctions might be appropriate; in WWIZ's case, on the other hand, the evidence after a full hearing had shown that denial of the renewal was required in the public interest (J.A. 22–24).

WWIZ petitioned the court of appeals for review of this order. On January 20, 1967 the court entered a judgment affirming the Commission's order on the basis of its opinion (Pet. 15).

It is manifest that petitioner's request to the Commission was untimely. The issues in its case were designated for hearing on February 21, 1962 (27 F.R. 2160). Yet it did not seek any modification of the hearing order until lengthy administrative proceedings had resulted in non-renewal, and all avenues of judicial review had been exhausted—some five years after the hearing order was entered. In any event its claim that the Commission was arbitrary is without substance.

Section 309(e) of the Communications Act, 47 U.S.C. 309(e) provides that when an application is set for hearing, the Commission "shall notify the applicant * * * [of] the grounds and reasons therefor, specifying with particularity the matters and things in issue * * *." It is undisputed that the

Commission's designation for hearing in this case complied with the statutory requirement: it gave petitioner clear notice that the Commission might deny renewal of its license if the alleged misconduct were proved. But this initial specification of the issues plainly did not preclude the Commission from exercising its discretion to select a less drastic remedy or sanction. At the close of the proceeding, the Commission was free to choose from a number of alternatives, and its decision shows that this discretion was consciously and deliberately exercised.[2]

Nor is there merit to petitioner's contention that the issues specified in its competitor's proceeding were significantly different. Rather, the Commission expressly noted that the evidence might "warrant sanctions such as those imposed in WWIZ, Inc." (30 F.R. 12694); it simply went on to note that the preliminary information suggested a far less serious violation, for which a fine might be appropriate sanction. Accordingly, the hearing order was formulated so as to serve both as a basis for denying renewal, 47 U.S.C. 309(e), and as a Notice of Apparent Liability pursuant to 47 U.S.C. 503(b)(2),[3] 30 F.R. 12694. The Commission's

[2] Thus, the Commission did not—as it might have—deny each of the several applications before it. It chose instead to deny WWIZ's request for renewal while at the same time granting renewal to station WFAR, Farrell, Pennsylvania, also owned by Schafitz. 36 F.C.C. 561. As other alternatives short of outright denial, the Commission could, for example, have granted renewal for a probationary short-term interval, 47 U.S.C. 307(d), or could have made a conditional grant.

[3] This section provides that licensees who violate the statute or Commission rules and orders shall forfeit to the United States a sum not to exceed $1,000.

preliminary assessment of WEOL's case in fact proved to be accurate, for the hearing examiner found, in an unappealed final decision for the Commission granting renewal, that there had been no unlawful transfer of control or other misconduct similar to WWIZ's activities. *Elyria-Lorain Broadcasting Co., et al.*, 5 F.C.C. 2d 231.

The petition for certiorari should be denied.

Respectfully submitted.

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Federal Communications Commission.

APRIL 1967.

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